#180



THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1980, c. 340, as amended

---

IN THE MATTER OF:

The Complaints of Mrs. Edilma Olarte, 1235 Bathurst Street, Mrs. Eneyda Mejia, 539 Dundas Street West, Mrs. Edilma Biljak, 190 Jamieson Avenue, Apt. 202, Mrs. Maria Majnolia Estrada, 650 Parliament Street, Apt. 605, Ms. Elvira Benel, 528A College Street, and Mrs. Yolanda Munoz, 94 Cowan Avenue, Apt. 202, all of Toronto, Ontario that Commodore Business Machines Ltd., its servants and agents, and Mr. Rafael DeFilippis, Supervisor at Commodore Business Machines Ltd., at 946 Warden Avenue, Toronto, Ontario, discriminated against each of them on the basis of sex, in contravention of paragraphs 4(1)(b) and/or (g) of the ONTARIO HUMAN RIGHTS CODE, R.S.O. 1980, c. 340, as amended and also IN THE MATTER of the Complaints of the said Ms. Elvira Benel and said Ms. Yoland Munoz that the said Commodore Business Machines Ltd., its servants and agents, and the said Mr. Rafael DeFilippis discriminated against them in contravention of paragraphs 5(a) and/or (e) of the said CODE.

APPEARANCES:

Ms. Michele Smith and Ms. Bella Fox, Counsel for the Ontario Human Rights Commission.

Ms. Paula M. Rusak, and Ms. D. Jane Forbes - Roberts, Counsel for the Respondents.

A HEARING BEFORE:

Peter A. Cumming, a Board of Inquiry in the above matters appointed by the Minister of Labour, the Honourable Russell H. Ramsay.

INTERIM DECISION

1. Introduction

This hearing involves six female Complainants who allege discrimination on the basis of sex in contravention of paragraphs 4(1)(b) and (g) of the Ontario Human Rights Code, .R.S.O. 1980, c. 340, as amended (hereafter the "Code"), against the corporate Respondent, Commodore Business Machines Ltd., and one of its employees, Mr. Rafael DeFilippis. The six Complainants were factory workers with the corporate Respondent at the times that they allege sexual harassment on the part of the individual Respondent with the knowledge and acquiescence of the corporate Respondent. The individual Respondent denies that he harassed any female employee and the corporate Respondent denies any harassment by its employees, and thus as well, any knowledge of harassment.

The Board of Inquiry has heard some six days of evidence to date, and the hearing has been adjourned until Monday July 4, 1983 at 10:00 a.m.

This interim decision relates to a motion by counsel for the Ontario Human Rights Commission to introduce what is referred to as "similar fact evidence" when the hearing resumes. Perhaps a motion such as this is properly one made by the Respondents objecting to the proposed evidence to be introduced in evidence. However, it was to

the convenience of all parties to have a determination by the Board of the matter well in advance of the resumption of the hearing July 4, so that counsel could prepare accordingly in the interim.

The Commission seeks to establish knowledge and acquiesence by the corporate Respondent of the alleged harassment by its employee, the individual Respondent. The Commission seeks to establish corporate responsibility. I have reviewed the law relating to corporate employer responsibility in respect of human rights violations in the recent case, Iancu vs. Simcoe County Board of Education (Jan. 3, 1983)[1].

Counsel for the Commission also emphasized that the Commission is seeking both compensatory and punitive damages in respect of the Complaints. The seeking of punitive damages is unusual. I have reviewed the law relating to damages in sexual harassment cases in a recent decision.[2] That issue need not be decided, of course, until a decision has been rendered on the merits, and a determination on the issue of 'punitive damages' may not be necessary in the final event. However, the point for the

1 At 14 - 43.

2 Torres v. Guercio (April 8, 1982), at 23-64.

purpose of this motion is that the Commission wishes to adduce as much evidence as it possibly can to establish corporate knowledge and acquiescence of the alleged harassment.

It is also clear from the evidence to this point in the hearing that the Respondent in their defence allege, inter alia, that there was collusion or a conspiracy by the Complainants against the Respondents.

I mention the above, not to imply any findings on the merits at this point in the hearing, but solely as background as to why 'similar fact' evidence is sought to be introduced. The Commission is of the view that such similar fact evidence is relevant to the establishing of corporate responsibility and establishing that there was not any conspiracy on the part of the Complainants, and to the question of punitive damages, if one or more of the Complainants are successful on the merits.

2. The Law

Mr. Justice Pigeon, in Guay vs. The Queen[1] stated:

> "On the admissibility of similar fact evidence, I think it should be said that it is essentially in the discretion of teh trial judge. In exercising this discretion, he must have regard to the general principles established by the cases. There is no closed list of the sort of cases where such evidence is admissible".[2]

In exercising its discretion, a Board of Inquiry should keep in mind the parameters for similar fact evidence, set forth by Lord Herschell in Makin vs. A.G. for New South Wales[3]

1 (1978), 42 C.B.C. (2nd) 536.

2 Id. at 547.

3 (1894) A.C. 57.

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committeed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."[1]

1 (1894) A.C. 65.

The fundamental issue in determining admissability of similar fact evidence is its probative value to the issues before the tribunal. That is, is the similar fact evidence relevant to the issues before the tribunal? However, given the possible prejudicial impact of similar fact evidence, its admission is exceptional and its admissability should be considered with caution.[1]

The probative value of the evidence is to be weighed against its prejudicial impact.[2]

> "Whether in the field of sexual conduct or otherwise, there is no general or automatic answer to be given to the question whether evidence of facts similar to those the subject of a particular charge ought to be admitted. In each case it is necessary to estimate (i) whether, and if so how strongly, the evidence as to other facts tends to support, i.e. to make more credible, the evidence given as to the fact in

1 Chia - Su Wan etal v. Greygo Gardens and Frank Peter (March 8, 1982: Robert W. Kerr).

2 R. v McNamara et al (1) January 15, 1981, unreported (Ont. C.A.) 87; 88; ((1981) 56 CCC (2nd) 288 (Ont. C.A.); Re Bell and Korczak (1980) 27 L.A.C. 227 at 287 to 289 (Owen Shime, Q.C.)

> question; (ii) whether such evidence, if given, is likely to be prejudicial to the accused. Both these elements involve questions of degree...The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force."[1]

Similar fact evidence has been admitted in criminal trials involving sexual offences to show a systematic course of conduct on the part of the accused. In Rex v. Christakos [2] the accused was charged with contributing to juvenile delinquency by seducing his young female employees. The Court stated:

> "...Their stories make clear that the accused used his position to compel them to submit to his sexual desires. He followed the same plan with all of them"..."The evidence of these girls is so similar that it establishes a planned method and system of debauchery which

1 Bordman v. D.P.P. (1975) A.C. 421, per Lord Wilberforce, at 442, 444.

2 (1946), I C.R. 34 (Man. C.A.).

> could not be elicited by the Court if confined to the case of the one girl named in the information"..."The accused man's dealings with this group of girls are so interlaced that they cannot be segregated without distorting the whole picture. His scheme of defilmement was so complete and co-ordinated that it should be uncovered in its entirety".[1]

Guay v. The Queen, supra, involved a simialr-type situation. The accused was charged with three counts of gross indecency while giving guidance counselling to young boys. The accused denied the charges, claiming that he only counseled the boys. The Crown called two other boys who had been counselled by the accused, and who testified to acts of indecency. The trial Judge, in convicting on each separate count, used as similar fact evidence both the evidence of the two boys which was not the subject of the three charges, and also the evidence adduced on the other counts.

[1] Id., at 37, 38, 39. See also R. v. Barrington (1981) 1 ALL E.R. 1132 (C.A.).

A decision of Prof. Morley Gorsky in a labour arbitration case, Windsor Board of Education and Federation of Women Teachers' Association of Ontario[1], cited by Respondents' counsel, is also helpful.

> "As I understand the position taken on behalf of the grievor, the evidence of past acts of discrimination, some of it referable to acts of previous boards, differently constituted or of acts of members of administration, past and present,will establish that"...a particular decision having the same result as earlier decisions also was motivated by discrimination" (Women Teachers' submission, at p. 4). Such a position is tantamount to a declaration that if one had a human disposition to behave in a particular fashion, then evidence of such disposition, based upon previous examples of its being manifested, ought to be admissable as evidence that such disposition was again manifested on a particular occasion. It is well established that "...evidence of

1 (1982) 3 LAC (3rd) 426.

human disposition to act in a certain manner is not admissable": see Sopinka and Lederman, The Law of Evidence in Civil Cases, at p. 23. In Phipson on Evidence it is stated at p. 204, para. 494:

> ...facts which are merely similar, however, and prove nothing more than disposition or likelihood of repetition, though logically relevant, are rejected as in criminal cases on grounds of fairness, since they tend to waste time and embarrass the inquiry with collateral issues...

Even if the evidence of alleged acts of past discrimination could be admitted as similar fact evidence to prove "a pattern of discriminatory decision-making from which an inference can be drawn that a particular decision having the same result as earlier decisions also was motivated by discrimination" then such inference could not be considered conclusive. This being the case, I would

> exercise my discretion and reject such evidence. See Phipson on Evidence, at p. 175, para. 442, where it is suggested that in such circumstances the similar fact evidence should be rejected.
>
> I am also concerned that the evidence to be adduced with respect to the alleged past acts of discrimination would"... require a time-consuming inquiry of the same type as the matter in issue": see Sopinka and Lederman, The Law of Evidence in Civil Cases, at p. 16." (Emphasis Added)[1]

In R v. McNamara et al (1)[2], the corporate defendants were charged with seven counts of conspiracy to defraud over 1967 to 1974 through bid-rigging in seven contracts. Similar fact evidence by corporation employees covering bid-rigging in other contracts for a much earlier time frame, 1959 to 1973, was held to be admissable to prove knowledge on the part of the corporate accused in respect of the charge in question. The number of incidents, and

1 (1982) 3 LAC (3rd) at 439.

2 Supra, page 6 n.2.

repetition of wrongful acts, was relevant to the issue of knowledge and acquiescence on the part of the corporate entity.

3. Nature of the 'Similar Fact' Evidence Sought to be Introduced.

The 'similar fact' evidence sought to be introduced can be separated into four distinct categories; (1) similar acts prior to the time frame of the complaints, (2) similar acts within the time frame of the six Complaints; (3) similar acts subsequent to the time frame referred to in the six Complaints; and (4) the similar acts of the other five Complaints in relation to any one specific Complaint. The witnesses sought to be called to testify as to 'similar facts' were referred to by number in Appendix "A" of the Commission's Brief in respect of the motion. The first matter to consider is the probative value or relevance of the evidence of these persons to the issues in this Inquiry.

Person # 1

Person # 1 is a male former employee of the corporate Respondents. He allegedly witnessed events in 1973 to 1974 that, if he so testifies and if he is believed, are relevant as to both the questioned conduct of the individual Respondent and the knowledge of the corporate Respondent.

Person # 2

Person # 2 was a female employee of the corporate Respondent in 1977. If she testifies as suggested, and if her evidence is accepted, it is relevant to the issues of conduct on the part of the individual Respondent and knowledge on the part of the corporate Respondent.

Person # 3

Person # 3 is a female worker, employed with the corporate Respondent in 1979 to 1980. If she gives the testimony it is suggested she will give, and if she is believed, her evidence is relevant to the issues as well.

Person # 4

Person # 4 is a female, employed by the corporate Respondent in 1981. It is stated that her testimony will relate to conduct amounting to sexual harassment by a plant foreman (i.e. not the individual Respondent) who worked under the authority of the individual Respondent for some time. Person # 4 allegedly complained to the plant manager about this forman's conduct but was rebuffed.

Presumably, Commission's argument would be that, if person # 4's evidence is given and believed, then the nature of the corporate Respondent's response to the situation in that instance tends to corroborate the alleged response of indifference to the alleged improper conduct of the individual Respondent in respect of the six Complaints.

However, even if person # 4's evidence is accepted, it does not tend in any way to corroborate knowledge on the part of the corporate Respondent in respect of the prior situations alleged in the six Complaints. The critical issue is whether sexual harassment is proven to have existed, and known to the corporate respondent in respect of the six Complaints. I do not view person # 4's evidence as relevant to this issue.

The argument is also made that acquiescence in a subsequent harassment is relevant to the issue of punitive damages for knowledge and acquiescence of harassment in the earlier alleged harassment suggested in the six

Complaints. I disagree. I do not think the actions of a corporate Respondent in a factual situation not involving either the individual Complainants or the individual Respondent can be relevant to any issue of punitive damages that may arise, if the Complaints are substantiated in a decision on the six Complaints.

Person # 5

Person # 5 is another female employee, employed in 1981, who makes basically the same allegations as person # 4 supra. My view on the admissability of her evidence is the same as that in respect of person # 4.

Person # 6

Person # 6 is a female worker, employed with the corporate Respondent from 1966 to 1983. If her evidence is given, and accepted, it is relevant for the same reasons as given in respect of persons # 1, #2 and 3.

Person # 7 and Person # 8

Person # 7, a female, worked from 1979 to 1983 for the corporate Respondent.

Person # 8 was a female employee in 1981, and again in 1982, who alleges sexual harassment on the part of the individual Respondent. Their evidence, if received and accepted, is relevant to the six Complaints, as tending to corroborate the allegations of sexual harassment and tending to disprove the defence of an alleged conspiracy on the part of the six Complainants.

Person # 9

Person # 9, a female employee of the corporate Respondent from 1979 to 1982 alleges harassment against the individual Respondent and knowledge and acquiescence on the part of the corporate Respondent. If her evidence is received and accepted, it is relevant as tending to corroborate the six Complaints.

Person # 10

Person # 10, a female, was employed from 1981 to 1983. She alleges sexual harassment by the individual Respondent, knowledge on the part of the corporate Respondent as she says she complained and sought a transfer which was given, and alleges pressure by management of the corporate Respondent in respect of evidence she might give in this hearing. In my view, her evidence, if received and accepted, is relevant as tending to corroborate the six Complainants in respect of their complaints against the individual Respondent, tending to support their contention that their was no conspiracy, and as tending to support their allegation that there was knowledge of harassment by the individual Respondent on the part of the corporate Respondent.

Person # 11

Person # 11 falls into the category of persons # 4 and # 5, for the same reasons.

4. Conclusion Applying the Law to the Evidence Sought to be Introduced

Persons # 1, #2, #3, #6, #7, #8, #9, and # 10 should be allowed to testify. Exercising my discretion, in my view the suggested evidence is relevant, that is, has a probative value for the issues in this hearing. The Ontario Human Rights Code prohibits discrimination because of sex (sexual harassment) in the workplace with the objective of extending to all employees equality of opportunity in employment, through assuring employment on the basis of merit rather than irrelevant, arbitrary criteria that offend the normative values of society.

The six Complaints all contain the same basic allegations - sexual harassment by the individual Respondent, and that such harassment was known and acquiesced in by the corporate Respondent.

In my opinion, the probative value of allowing the evidence of Persons #1, #2, #3, #6, #7, #8, #9 and # 10 far outweighs any possible prejudicial (in the sense of unfairness) impact.

All six Complainants, and the above mentioned persons, are alleging a pattern or system of conduct toward female employees, on the part of the same individual within the same factory of the same employer. The difference in time frames of employment by some witnesses is, to my mind, an irelevant factor for the most part. What is certainly

relevant is evidence that goes to the main issue of the employment relationship between female employees, their supervisor, the individual Respondent, and whether there was unlawful conduct on his part, and if this is established, then whether it was known and acquiesced in by the corporate Respondent. The evidence of all these persons relates to the same matter - the relationship of the Respondents to female employees. The evidence of each of the persons referred to, and each of the Complainants, if believed, will tend to corroborate the Complaints.

It is pertinent as well to mention that the six Complainants are Spanish-speaking immigrants. Commission counsel asserted that some of the persons she seeks to give evidence as witnesses are immigrants who speak a language (Greek or Portuguese) other than Spanish.[1] Accordingly, she asserts that their evidence if received and accepted, would tend to support Complainants' contention that there was no conspiracy on their part against the Respondents.

However, the opposite holds true as well. If any one or more witness's testimony is not accepted, it may tend to throw doubt upon the testimony of the others, and will tend to support the Respondents' contention that there was no discrimination, and that there is a conspiracy on the part of two or more of the Complainants. I do not see any unfairness in the admission of evidence by persons #1, #2,

[1] Transcript of Evidence, vol. VII, pp. 75,76.

#3, #6, #7, #8, #9 and # 10. It might be unfair to either the Complainants or Respondents to exclude their evidence. Presumably, if the witnesses testify along the lines set forth in Appendix "A" of the Commission's Brief, and their evidence is believed, it will tend to support the Complainant's case. However, that remains to be seen, of course. I cannot prejudge evidence that has not been given. It may be that the evidence of one or more of these persons will, as matters turn out, be of assistance to the Respondents. The point of this Interim Decision is to hold that the evidence of such witnesses, if given, is not excludable on a basis of being improper "similar fact" evidence. For the same reasons, the evidence of each one of the Complainants is relevant and admissible to a determination of the other five Complainants' cases.

For the same reasons as well, in my opinion the evidence of persons # 4, #5 and # 11, if given and believed, would not be relevant to a determination of the issues in respect of the six Complaints. Admittedly, there may be some, very slight, probative value to such evidence, but I think the appearance of prejudice would far outweigh such slight, tenuous, probative value. I say "appearance of prejudice" because I would give very little weight, perhaps none, to the impact of such evidence upon the central issues of this hearing in any event. Persons #4, #5 and #11 relate to accusations of <u>another</u> supervisor, albeit in the same workplace of the same employer. The conduct of another

person toward female employees has a tenuous connection at best to the issue of the conduct of the individual Respondent. As well, because they relate to a time frame in each instance, that is subsequent to the time frame referred to in the six Complaints, they are not very helpful in determining knowledge on the part of the corporate Respondent for the earlier Complaints - related time frame. In my opinion, persons #4, #5 and #11 should not give evidence, as the suggested evidence is "similar fact" evidence that is not properly admissable

As I queried during argument with respect to this Motion[1], the evidence of persons #4, #5 and #11, if given as suggested and if accepted, would establish that foreman "Y", who worked under the individual Respondent, sexually harassed female employees in a time frame subsequent to the time frame referred to in the six Complaints and would further establish that the corporate Respondent knew of "Y's" harassment. The suggested inference then to be made is that Y knew the corporate Respondent knew of his, Y's harassment, but Y thought he could harass with impunity because he, Y, also knew of the individual Respondent's earlier harassment, and Y also knew that the corporate Respondent knew of the individual Respondent's earlier harassment. However, apart from the very tenuous connection any such inferences might have to the main issues in this

[1] Transcript Evidence, vol. VII, pp. 104 to 109.

Inquiry, being first, whether the individual Respondent harassed and second, whether the corporate Respondent had knowledge of and acquiesced in such harassment by the individual Respondent, the evidence of persons #4, #5 and #11 really returns us in a circular fashion to these main issues and their evidence is not helpful in making the suggested inferences without there being proof of those main issues. Their evidence does not help unless it is first shown both that the individual Respondent harassed and also that the corporate Respondent knew of such harassment. If these issues are proven, there is no need for the testimony re Y.

I am also mindful that this Inquiry has already consumed a good deal of time, and will undoubtedly involve a good deal more time to complete, and while the matter of the length of a hearing cannot, of course, govern the issue of the admissability of evidence, the evidence of persons #4, #5 and #11 (and Respondents' presumed evidence in response) would occupy some considerable time in an already lengthy hearing and would have a very slight probative value, at most, to the central issues of the Inquiry.

If there are any questions by either counsel about the impact of this Interim Decision, the Hearing can be reconvened briefly to consider such questions in advance of July 4, 1983, being the date set for the reconvening of the hearing. I do not consider it necessary to make an Order at this point in time.

Dated at Toronto this 31st day of March, 1983.

Peter A. Cumming

Board of Inquiry